LIBRARY
SUPREME COURT, U. S.

FILED
FEB 7 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1211

CLAUDE S. CARTER, JR., and THOMAS C. BURKHEAD,
Petitioners,

v.

STATE OF ARKANSAS,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Arkansas

JACK L. LESSENBERRY
803 West Third Street
Little Rock, Arkansas 72201

RICHARD S. ARNOLD
507 Hickory Street
Texarkana, Arkansas 75501

JIM HOOPER
406 Texas Boulevard
Texarkana, Texas 75501
Attorneys for Petitioners

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

INDEX

Page

Opinion Below 1

Jurisdiction 2

Questions Presented 2

Statutes and Constitutional Provisions Involved 2

Statement of the Case 3

Reasons for Granting the Writ 5

Conclusion 12

Appendix

Opinion and Judgment of the Supreme Court of Arkansas A-1

Order Denying Rehearing A-12

CITATIONS

Cases

Acanfora v. Board of Education, 359 F. Supp. 843 (D. Md. 1973) 9

Connor v. State, 253 Ark. 854, 490 S.W.2d 114, appeal dismissed for want of a substantial federal question, 42 U.S.L. Week 3269 (U.S. November 5, 1973) (No. 72-1612) 5-6

Furman v. Georgia, 408 U.S. 238 (1972) 11

Holt v. Hutto, 363 F. Supp. 194 (E.D. Ark. 1973) 10

Holt v. Sarver, 442 F.2d 304 (8th Cir. 1971), affirming 309 F. Supp. 362 (E.D. Ark. 1970) 10

Musser v. Utah, 333 U.S. 95 (1948) 7

Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969) 9

Olmstead v. United States, 277 U.S. 438 (1928) 8

O'Neil v. Vermont, 144 U.S. 323 (1892) 11

Raley v. Ohio, 360 U.S. 423 (1959) 7

Ricks v. District of Columbia, 414 F.2d 1097 (D.C. Cir. 1968) 8

Roe v. Wade, 410 U.S. 113 (1973) 8

Stone v. Wainwright, 42 U.S.L. Week 3267 (U.S. November 5, 1973) (No. 73-122), reversing 478 F.2d 390 (5th Cir. 1973) 6

Weems v. United States, 217 U.S. 349 (1910) 11

Statutes and Other Materials

Ark. Stat. Ann. § 41-813 ..... 2, 3, 6

Ark. Stat. Ann. § 41-814 ..... 3, 5

Ark. Stat. Ann. § 41-2208 10

Ark. Stat. Ann. §§ 41-2228, 41-2229 10

United States Constitution:

Amendment Eight 4

Amendment Fourteen 3, 4

Mill, On Liberty, Ch. 1 (1859) 9

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-.....

CLAUDE S. CARTER, JR., and THOMAS C. BURKHEAD,
Petitioners,

v.

STATE OF ARKANSAS,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Arkansas

Petitioners Claude S. Carter, Jr., and Thomas C. Burkhead respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the Supreme Court of Arkansas in this proceeding, which Judgment became final on November 13, 1973.

OPINION BELOW

The Opinion of the Supreme Court of Arkansas appears in the Appendix hereto. It is reported at 255 Ark. 225, 500 S.W.2d 368.

JURISDICTION

The Judgment of the Supreme Court of Arkansas was entered on October 8, 1973. It became final on November 13, 1973, when petitioners' timely Petition for Rehearing was denied. This Petition for Certiorari was filed within 90 days of the latter date. This Court has jurisdiction under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether Section 4 of the Act of the General Assembly of Arkansas adopted December 17, 1838, as amended, which, as construed by the Supreme Court of Arkansas, makes criminal any "unnatural" sex act, is unconstitutionally vague.

2. Whether criminal conviction of these two petitioners, both of whom are adults, for engaging in sexual relations with one another in private, violates their constitutional right of privacy.

3. Whether imprisonment for eight years in the Arkansas State Penitentiary, at which the Federal Courts have recently found homosexual attacks to be prevalent, is, under the circumstances of this case, a cruel and unusual punishment in violation of the Fourteenth Amendment.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 4 of the Act of the General Assembly of Arkansas adopted December 17, 1838, as amended by Section 1 of Act 128 of 1955, now codified as Ark. Stat. Ann. § 41-813, reads as follows:

> Every person convicted of sodomy, or buggery shall be imprisoned in the penitentiary for a period of not less than one (1) nor more than twenty-one (21) years.

Section 163 of Chapter 45 of the Revised Statutes of Arkansas of 1838, now codified as Ark. Stat. Ann. § 41-814, reads as follows:

> Proof of actual penetration into the body shall be sufficient to sustain an indictment for the crime against nature.

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides, in pertinent part

> Nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

Petitioners were arrested by two sheriffs' deputies at about 11:00 o'clock on the night of September 27, 1972. The arrest took place at a camping ground owned and maintained by the State of Arkansas for the convenience of tourists and located near Interstate Highway 30 in Miller County, Arkansas. Petitioners were in the front seat of an automobile owned by the petitioner Carter. Although four other cars and one or two "campers" were parked in the same general area, there was no evidence that anyone, other than the two deputies who were the State's only witnesses, took any notice of petitioners. After the arrest, petitioners were charged with violation of Ark. Stat. Ann. § 41-813, which imposes a penalty of from one to 21 years' imprisonment for "sodomy, or buggery." There is no statutory definition of this crime.

This is only one of four criminal proceedings brought against petitioner Carter at approximately the same time. He has also

been charged with the misdemeanor of making a threatening telephone call. This charge was tried in the Municipal Court of Texarkana, Arkansas, and resulted in a conviction and sentence of one year's imprisonment. Petitioner Carter's appeal from this conviction is now pending in the Circuit Court of Miller County, Arkansas. A charge of contempt of court, arising out of the same situation that gave rise to the charge of making the threatening telephone call, has also been lodged against petitioner Carter in the Circuit Court of Miller County, Arkansas. This charge is still pending and has not been tried. After his testimony in the same trial court in the instant case, petitioner Carter was also charged with perjury. The trial of this charge resulted in a directed verdict of acquittal.

The instant case was tried in the Circuit Court of Miller County, Arkansas, on February 19, 1973, before a jury. Before the trial, petitioners raised by Motion to Dismiss the Information the contentions that the statute under which they were charged was unconstitutionally vague and infringed their Federal constitutional right of privacy. R. 13, 14. This Motion was overruled on its merits. R. 32, 33. At the close of the trial, the Motion to Dismiss was renewed, R. 145, and was again overruled on its merits. *Ibid.* With respect to the definition of the crime for which petitioners were being tried, the trial court instructed the jury as follows (R. 150):

> Sodomy is the unnatural sex act by human beings with each other, or by a human with an animal.

After deliberation, the jury returned a verdict of guilty and fixed petitioners' punishment at eight years in the Arkansas State Penitentiary. (Under Arkansas law, the jury fixes the punishment.) On appeal to the Supreme Court of Arkansas, petitioners again raised the Federal issues of vagueness and right of privacy. In addition, they contended that the sentence of eight years was so disproportionate to the nature of the offense

charged as to constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States. On October 8, 1973, the Supreme Court of Arkansas affirmed the conviction and sentence, rejecting petitioners' Federal claims on their merits. A timely Petition for Rehearing was denied on November 13, 1973, and this Petition for Certiorari followed.

REASONS FOR GRANTING THE WRIT

1. The crime of which petitioners have been convicted was first prohibited by statute in Arkansas by Section 4 of the Act of December 17, 1838. This statute provided that the punishment for the crime of "sodomy, or buggery" would be not less than five or more than 21 years' imprisonment. At about the same time, the Arkansas General Assembly adopted Section 163 of Chapter 45 of the Revised Statutes of 1838. This provision states that penetration into the body is necessary for conviction of "the crime against nature." The latter statute has never been amended and is now codified as Ark. Stat. Ann. § 41-814. The former statute, under which petitioners have been convicted, has been amended only once. Section 1 of Act 128 of 1955 changed the punishment so as to reduce the minimum term from five years to one year. The maximum term remained fixed at 21 years. According to Section 3 of Act 128 of 1955, the Arkansas General Assembly took this action because "there appears to be some reluctance on the part of the juries of this State to convict a person of the crimes of sodomy and buggery if the minimum sentence is five (5) years. . . ."

There is no statute defining "sodomy, or buggery." Neither is there any statute defining "the crime against nature." The Supreme Court of Arkansas, however, has construed these two statutes so as to furnish a definition. The leading case is **Connor v. State,** 253 Ark. 854, 490 S.W.2d 114, **appeal dismissed for**

want of a substantial federal question, 42 U.S.L. Week 3269 (U.S. November 5, 1973) (No. 72-1612). **Connor** involved an information charging violation of § 41-813 by the defendant Connor with a 14-year-old boy. (By contrast, petitioner Carter was 28 years old at the time of this trial, and petitioner Burghead was 51 years old.) The Supreme Court said:

> "Whether it is called sodomy, buggery, or crime against nature—as it is often called interchangeably—it boils down to a simple definition that it is an unnatural sex act which is condemned. It is the opposite of a **natural** sex act; the manner of a **natural** sex act is well known, even to the young and the uneducated." 253 Ark. at 856, 490 S.W.2d at 115 (emphasis in original).

Thus, the trial court was being faithful to authoritative decisions of the Supreme Court of Arkansas when it told the jury in the instant case that "sodomy is the unnatural sex act by human beings with each other, or by a human with an animal." The key word in the definition, of course, is "unnaural." The Supreme Court of Arkansas has defined this term as "the opposite of . . . natural," and has gone on to observe, as just noted, that "the manner of a natural sex act is well known . . ." Accordingly, under the well-established doctrine that a statute carries with it the construction of the highest Court of the State, petitioners here stand convicted, in effect, of committing "an unnatural sex act."

The issue is simply whether the words "natural" and "unnatural" are precise enough to justify the imposition of criminal punishment. The cases in this Court and in the lower courts dealing with this type of issue are legion. One of the most recent cases is the per curiam opinion of this Court in **Stone v. Wainwright,** 42 U.S.L. Week 3267 (U.S. November 5, 1973) (No. 73-122), **reversing** 478 F.2d 390 (5th Cir. 1973). There, a Florida statute prohibiting "the abominable and detestable

crime against nature" was held not to be unconstitutionally vague. The basis of the decision, however, was that previous opinions of the Supreme Court of Florida had made it clear that the acts charged came within the statute. Here, unlike **Stone,** both the most recent pronouncement of the Supreme Court of Arkansas, and the definition of the crime given the jury by the trial court, left the matter completely at large. The jury were advised that they were free to convict petitioners, indeed, that they had a duty to do so, if they found that an "unnatural sex act" had been committed. No guidance was given as to what "natural" or "unnatural" might mean.

As this Court observed in **Raley v. Ohio,** 360 U.S. 423, 438 (1959), "a State may not issue commands to its citizens, under criminal sanctions, in lanugage so vague and undefined as to afford no fair warning of what conduct might transgress them." A similar issue was discussed, though not decided on its merits, in **Musser v. Utah,** 333 U.S. 95 (1948). The Utah statute involved there made it a crime to conspire "to commit any act injurious to . . . public morals." The Court said, in words that could well be applied to the instant case, "standing by itself [this statute] . . . would seem to be warrant for conviction for agreement to do almost any act which a judge and jury might find at the moment contrary to his or its notions for what was good for health, morals, trade, commerce, justice, or order." 333 U.S. at 97. Similarly, the Arkansas statute involved here is warrant for conviction for doing almost any act which a judge and jury might find at the moment "unnatural." Even if petitioners were caught in the act of fellatio, as the police officers testified, and even if, contrary to the argument advanced later in this Petition, the State has power to prohibit such an act in private between consenting adults, petitioners and the public at large are entitled to a clearer warning that their conduct can send them to the penitentiary for as long as twenty-one years.

2. In **Roe v. Wade,** 410 U.S. 113, 152-55 (1973), this Court made clear that the Fourteenth Amendment does create a Federal constitutional right of privacy protected against infringement by the States except on the basis of a compelling State interest. There are, in other words, certain things that people may do to or for themselves that the State may not make criminal, no matter how repulsive these acts may seem to a majority of the citizenry. In **Roe,** it was held that a State may not protect a potential human life against the decision of the mother to destroy it by abortion. A woman, the Court seemed to say, is the mistress of her own body and may do as she pleases with it, even though other persons or potential persons (the father and the fetus) may be adversely affected. The Court appears to have adopted as law the famous pronouncement of Mr. Justice Brandeis, dissenting, in **Olmstead v. United States,** 277 U.S. 438, 478 (1928), that "the right to be let alone" is "the most comprehensive of rights and the right most valued by civilized men."

The instant case is *a fortiori* from **Roe**. Here, no one's interests were involved other than those of the petitioner's themselves. Assuming, in accordance with the State's evidence, that they were engaged in sexual relations with one another, they were doing what they wanted to do. They were adults and *sui juris*. Neither of them were resisting, and no argument to that effect has been made. Neither was there any claim made, or evidence presented, to the effect that any person, other than the two officers who found what they were looking for, witnessed or was offended by petitioners' acts.

The engine of criminal justice is a fearsome tool. Imprisonment is the harshest penalty known to our law and carries with it the greatest stigma. This punishment has traditionally been imposed only for the doing of harm to others. As the United States Court of Appeals for the District of Columbia Circuit observed in **Ricks v. District of Columbia,** 414 F.2d 1097, 1108 (D.C. Cir. 1968): "Definitions of crime traditionally combine a wrongful intent with a guilty act in a causal relationship to a

consummated social harm" (emphasis supplied). It is true that the land upon which petitioner Carter's automobile was parked belonged to the State but the act charged was in no realistic sense performed "in public". Petitioners were inside the car, it was dark, and had the officers not shined their flashlights into the front seat, no charge would ever have been brought. Similar conduct in an automobile on a public street (a less compelling case than the present one) has been held to be "private conduct". **Norton v. Macy,** 417 F.2d 1161, 1167, n.27 (D.C. Cir. 1969).

The heart of the matter is that what petitioners did, assuming *arguendo* that they did what was charged, hurt no one, with the possible exception of themselves. It has recently been held that the State of Maryland may not constitutionally exclude homosexuals per se from employment as teachers. **Acanfora v. Board of Education,** 359 F. Supp. 843, 844-53 (D. Md. 1973). The courts would do well to heed the words of the libertarian philosopher John Stuart Mill:

> . . . The only principle for which power can rightfully be exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not sufficient warrant. He cannot rightfully be compelled to do or forebear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise or even right. These are good reasons for remonstrating with him, but not for compelling him or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to someone else. The only part of the conduct of anyone for which he is amenable to society is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute over himself. Over his own body and mind, the individual is sovereign.

Mill, **On Liberty** ch. 1 (1859).

3. In any event, eight years in the Arkansas State Penitentiary is more than anyone can or should seek to justify as a proper punishment for the conduct charged here.

The Arkansas State Penitentiary, it is worth remembering, is not just any penitentiary. Homosexual assaults and rapes, in very recent times, have been one of the most prominent characteristics of that penal institution. "Prisoners are frequently attacked and raped in the dormitories and injuries and deaths have resulted. . . . No adequate means exist to protect the prisoners from assaults." **Holt v. Sarver,** 442 F.2d 304, 308 (8th Cir. 1971), **affirming** 309 F. Supp. 362, 377 (E.D. Ark. 1970). It is true that conditions have improved somewhat, and "the prison is not what it was in former days"; still, as recently as August of 1973, the United States District Court for the Eastern District of Arkansas found that "inmate assaults on other inmates . . . still occur . . ." **Holt v. Hutto,** 363 F. Supp. 194, 199 (E.D. Ark. 1973).

The incongruity and barbarity of what the State of Arkansas proposes to do to petitioners is even more glaring when the penalty visited upon them is compared with the penalty imposed by the General Assembly for other crimes. For example, the maximum punishment for murder in the second degree is 21 years in the penitentiary, the same as the maximum punishment for the crime for which petitioners have been convicted. Ark. Stat. Ann. §41-2228. Even more startling, the maximum punishment for voluntary manslaughter is seven years. Ark. Stat. Ann. §41-2229. Arkansas defines voluntary manslaughter, in a manner similar to that of the traditional common law, as a voluntary killing, upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistable. Ark. Stat. Ann. §41-2208. Thus, if petitioners had voluntarily killed another human being, under circumstances deemed by a jury to constitute sufficient provocation, they could have been sentenced to seven years in the penitentiary at

most. The punishment actually imposed upon them in this case is one year more. There is no rational justification for such a distinction.

In other words, the penalty imposed, under the circumstances of this case, having in mind the nature of the act charged (that it harmed no one but the petitioners themselves), the nature of the institution where the sentence is to be served, and the nature of the punishment deemed appropriate by the General Assembly of Arkansas for the voluntary taking of a human life, is simply so disproportionate as to constitute a cruel and unusual punishment. It is one of those "punishments which by their excessive length or severity are greatly disproportioned to the offenses charged," **Weems v. United States,** 217 U.S. 349, 371 (1910), quoting with apparent approval the dissenting opinion of Mr. Justice Field in **O'Neil v. Vermont,** 144 U.S. 323, 329-30 (1892). Furthermore, even if the definition of "unnatural" is thought to be sufficiently clear to avoid the difficulty of unconstitutional vagueness, no one could deny that the jury here had broad latitude to convict or acquit depending upon their own views of what is "natural" or not. They also had broad latitude, stretching from one year to 21, in determining the punishment. There was wide scope for arbitrary and subjective judgment—precisely the situation in which the danger of cruel and unusual punishment is particularly great. **Cf. Furman v. Georgia,** 408 U.S. 238, 280, 282 (1972) (Brennan, J., concurring).

CONCLUSION

The Writ of Certiorari should be granted to review the Judgment of the Supreme Court of Arkansas. On plenary consideration, that Judgment should be reversed and the cause remanded with directions to dismiss the information.

Respectfully submitted

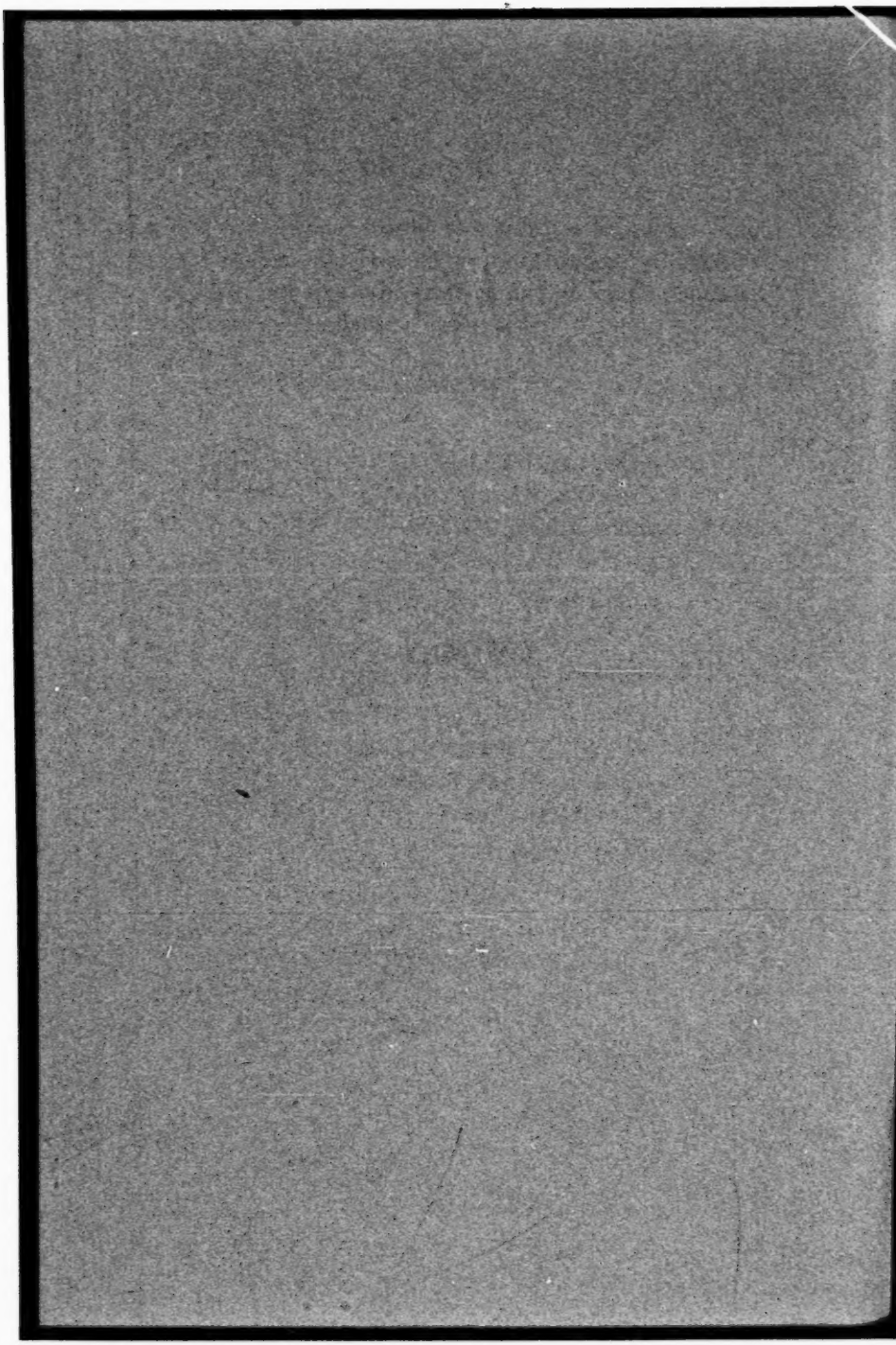
JACK L. LESSENBERRY
803 West Third Street
Little Rock, Arkansas 72201

RICHARD S. ARNOLD
507 Hickory Street
Texarkana, Arkansas 75501

JIM HOOPER
406 Texas Boulevard
Texarkana, Texas 75501

Attorneys for Petitioners

APPENDIX



Supreme Court of Arkansas

Claude S. "Sandy" Carter, Jr., and Thomas C. Burkhead,
Appellants,
v.
State of Arkansas,
Appellee.
No. CR 73-82

Opinion Delivered October 8, 1973

Appeal from Miller Circuit Court; John W. Goodson, Judge
Affirmed.

John A. Fogleman, Justice

Appellants Carter and Burkhead were found guilty of sodomy, alleged to have occurred shortly after 11:00 p.m. in Carter's automobile which was parked at the public rest and tourist information facility adjacent to Interstate Highway 70, where other parties had parked trucks, automobiles and campers. Appellants admit the evidence is sufficient to sustain the jury verdict, if our sodomy statute is constitutional as applied to them. Thus, it will be unnecessary for us to set out the sordid testimony about the act, which appeared so revolting to one of the two deputies sheriff, who stated they observed it while patrolling the area, that he vomited thrice during the evening—the first time as an immediate reaction to his seeing what was taking place in the automobile, and the others while appellants were in custody and being "booked." Although both appellants flatly denied that they had engaged in the homosexual act related by the police officers, they contend that even if they had done it, the state's evidence only shows a consensual act in which two adult persons engaged. They were

charged in the information on which they were tried with voluntary participation in an unnatural sex act in violation of Ark. Stat. Ann. § 41-813 (Repl. 1964).

The principal ground for reversal is that: the statute itself is an invasion of their right to privacy, which they allege to be protected by the First, Fifth, Sixth, Ninth and Fourteenth Amendments to the United States Constitution; the statute is so vague and ambiguous as to deprive them of rights guaranteed by the state and federal constitutions; the application of the statute to them serves no legitimate state interest and that enforcement of the statute constitutes cruel and unusual punishment. Appellants introduce their argument with a statement that they do not suggest the statute be declared unconstitutional in every application. They contend it is "only unconstitutionally overbroad as applied to consenting adults because all persons who engage in acts of sodomy are subject to prosecution under the terms of the statute, including husband and wife, consenting adults of the opposite sex, or consenting adults of the same sex, regardless of whether the act is committed in public or in private."

The very strong presumption of constitutionality attendant upon every statute, requiring that all doubt be resolved in favor of constitutionality, is enhanced by the highly persuasive fact that the statute was long unassailed. See **Stone v. State,** 254 Ark. . . . (July 23, 1973); 494 S.W.2d 715; **Williams v. State,** 253 Ark. . . . (February 12, 1973), 490 S.W.2d 217; **Poole v. State,** 244 Ark. 1222, 428 S.W.2d 628. As we said in **Williams,** if such a statute were in violation of federal constitutional principles, surely the thought would have long since occurred to the many legal scholars and jurists of this state. Appellants have not, by their multifaceted attack, met their very heavy burden of showing that this statute is unconstitutional.

We recently had occasion to consider and reject an attack on the constitutionality of this same statute in **Connor v. State,**

253 Ark. — (January 29, 1973), 490 S.W.2d 114. We do not agree with appellants that the difference in the two cases is sufficient to justify a re-examination of our holding there. We will turn our attention to arguments asserted as new and to alleged distinctions. Appellants allege a minor was involved and consent was not established in **Connor.** No point was made of the participation of the minor in reaching our conclusion in **Connor.** The mere fact that a participant is a minor does not prevent his consenting to the act. See **Strum v. State,** 168 Ark. 1012, 272 S.W. 359.

We can reject all cases cited by appellants relating to acts committed in private out of hand. No such act is involved here, in spite of a rather frail argument that the act, if committed, was done in the privacy of Carter's automobile in a secluded area of a roadside park. In our opinion, the record simply does not support the idea that the act was committed in private or in a rather remote area of the roadside park. Officer Phillips testified that the area was well lighted, and it was unnecessary for one to use a flashlight to observe people in the cars. The area is only 120 to 140 yards off the main interstate highway. It is approximately 40 to 60 yards wide. Burkhead described the area as quite crowded. He said there were a lot of people around and that some of the many cars parked in the area were near the Carter automobile. No greater degree of privacy than that shown in **Connor** can be said to have existed here.

We can just as readily dismiss those cases based on conduct between married persons and those rendered in jurisdictions where a "non-criminal physical relationship of homosexual nature" was involved. We do not find anything in citations to various "sex manuals" (even though they may have been best sellers) to be of such compelling force or effect that we may take judicial notice of the supposed data, arguments and recommendations of the authors, the expertise of some of whom

is at least questionable. We likewise find nothing which persuades us that the **Connor** decision was wrong. If the legislative branch should, in the exercise of its investigative powers, find these works credible considering statutory revision, we would acknowledge not only that the matter is, but that it should be, within its province. **See People v. Hurd,** 5 Cal. App. 3d 865, 85 Cal. Rptr. 718 (1970); **People v. Ragsdale,** 177 Cal. App. 2d 676, 2 Cal. Rptr. 640 (1960); **People v. Massey,** 137 Cal. App. 2d 623, 290 P.2d 906 (1955).

In some mystical manner, appellants have woven together various unrelated decisions as support for their argument that the statute is an overbroad invasion of their right to privacy. These decisions all struck down some act as unconstitutional, and include those having to do with the education of children, compulsory sexual sterilization of habitual criminal offenders, interracial marriage and sexual relations, access to contraception information, private possession of obscene materials, and abortions. As we understand appellants' argument, these cases lend support to their position because they demonstrate that the expansion of the "right to privacy in matters of intimate personal preference" is based upon the courts' having taken cognizance of dramatic changes in social conditions which have made legal doctrines once appropriate become unsuited for contemporary society. If social changes have rendered our sodomy statutes unsuitable to the society in which we now live, we need not be concerned about the matter because there is a branch of our government within whose purview the making of appropriate adjustment and changes peculiarly lies. Since that branch has not acted, we adhere to the views expressed in **Connor.**

Appellants' argument, that there is no legitimate state interest to be served by applying the sodomy statute to them, is hinged to a very great extent upon the contention that somehow the statute is constitutionally forbidden by that clause of the First

Amendment to the Constitution of the United States prohibiting laws respecting establishment of religion. We rejected this argument in **Connor** and reject it here, and for the same reasons. The appellants additionally assert that the state must articulate the secular, social interests the statute under attack seeks to protect, suggesting that the failure to do so shows that the only purposes served to relate to establishment of religion. We do not think a recitation of purpose in the statute is necessary. Even if we should concede, and we do not, that the state had no interest in the suppression or minimization of sexual perversion, the condition existing at the time of this offense is illustrative of a valid state interest. Officer Phillips testified that the site is often frequented by children. The two male appellants, purportedly unacquainted, met there and in only a few minutes were in an automobile in the well lighted area enjoying fellatio. On cross-examination, Officer Phillips was asked to read his arrest report. It disclosed that this area, constructed for enjoyment and rest by travelers, had come to be frequented by homosexuals and that the sheriff's office had received many complaints of such acts being observed and of visitors being approached by homosexuals. This is a clear and sufficient indication of the public interest to be served by the sodomy statute. People who come to such places for rest, recuperation and relaxation have a right to be unmolested, particularly by those in search of the exercise of their claimed right to sexual perversion, and should not expect to find in such havens as this the type of activities with which appellants were charged.

The police power is very broad and comprehensive and embraces maintenance of good order and quiet of the community, and preservation of the public morals, **Williams v. State,** 85 Ark. 464, 108 S.W. 838, 26 L.N.S. 482, 122 Am. St. Rep. 47, aff'd 217 U.S. 79, 30 S. Ct. 493, 54 L. Ed. 673, 18 Ann. Cas. 865; **City of Helena v. Dwyer,** 64 Ark. 424, 42 S.W. 1071. Under it, the legislature may, within constitutional limitations,

prohibit all things hurtful to the comfort, safety and welfare of the people and prescribe regulations to promote the public health, morals and safety. **Wright v. DeWitt School District,** 238 Ark. 906, 385 S.W.2d 644; **Williams v. State,** supra; **Dabbs v. State,** 39 Ark. 353, 43 Am. Rep. 275. In its exercise the legislature has a wide discretion in determining what the public interest demands and what measures are necessary to meet these requirements, and is limited only by the principle that its acts must reasonably **tend** to correct some evil and promote some interest of the commonwealth not violative of any direct, positive or necessarily implied constitutional mandate, or opposed to natural right and fundamental principles of civil liberty. **Wright v. DeWitt School District,** supra; **Fiser v. Clayton,** 221 Ark. 528, 254 S.W.2d 315; **Dabbs v. State,** supra. See also, **City of Helena v. Dwyer,** supra. It is the duty of the courts to resolve all doubts in favor of the legislative action and to sustain it unless it appears to be clearly outside the scope of reasonable and legitimate regulation. **Williams v. State,** supra; **Dabbs v. State,** supra. In **Williams,** we found a legitimate state interest in prevention of annoyance to travelers by drummers soliciting for physicians, bath houses, hotels, etc.

In any event, we consider the sodomy statute to be a legitimate exercise of the police power by the General Assembly to promote the public health, safety, morals and welfare. See **State v. Rhinehart,** 70 Wash. 2d 649, 424 P.2d 906; **People v. Hurd,** 5 Cal. App. 3d 865, 85 Cal. Rptr. 718 (1970).

Although appellants nowhere state, as a point for reversal, that our sodomy statute is void for vagueness, they somehow weave such an assertion into their argument that the statute serves no legitimate state interest. It is sufficient to say that whenever the definition of general words in a criminal statute, passed pursuant to the police power, may be adequately determined through reference to judicial decisions construing the statute, it is not void for vagueness. See **State v. Anthony,** 179

Ore. 282, 169 P.2d 587 (1946). In **Connor,** we found the definitions in **Strum v. State,** 168 Ark. 1012, 272 S.W. 359; **Mangrum v. State,** 227 Ark. 381, 299 S.W.2d 80; **Havens v. State,** 217 Ark. 153, 228 S.W.2d 1003; and **Smith v. State,** 150 Ark. 265, 234 S.W. 32, adequate to meet this challenge, if the statute were otherwise subject to attack on this score. We again reject this argument.

Appellants also argue that since a maximum sentence of 21 years may be imposed upon consenting adults for sodomy, and the maximum punishment for husband and wife engaging in normal sexual intercourse under the same circumstances would constitute nothing more than disorderly conduct, enforcement of the statute constitutes cruel and unusual punishment. Appellants call our attention to Ark. Stat. Ann. §§ 41-1432, 41-1401 and 41-2701 (Repl. 1964). Assuming, without deciding, that these statutes, and only these, would apply in the postulated case, the greatest possible punishment would be a fine of $300 and a jail sentence of one year. In order to sustain appellants' argument here, whether it be based on cruel and unusual punishment or equal protection criteria, we would have to accept their arguments hereinabove rejected as a premise. This we cannot do. It is within the province of the legislative branch to classify crimes and determine the punishment therefor. **Stout v. State,** 249 Ark. 24, 458 S.W.2d 42; **Thom v. State,** 248 Ark. 180, 450 S.W.2d 550. No punishment authorized by statute, even though severe, is cruel and unusual unless barbarous or unknown to the law, or so wholly disproportionate to the nature of the offense as to shock the moral sense of the community. **Davis v. State,** 246 Ark. 838, 440 S.W.2d 244. We cannot say that either appellants' eight-year sentence or the 21-year maximum fails to meet any of these tests for constitutionality.

It is a long-standing rule of this court, and generally of other courts, that in order for one to have standing to challenge the constitutionality of a legislative act, the act must be unconstitu-

tional as applied to him. If appellants' attack, as stated and restated by them, is hinged, in substantial part, upon the assertion that the statute draws no distinction between acts committed in public and acts committed in private, the very absence of the element of privacy of the act should deprive appellants of any standing to question the constitutionality of the statute. Certainly they have no standing to challenge its constitutionality as applied to husband and wife or consenting adults of opposite sexes. See **May v. State,** 254 Ark. — (April 9, 1973), 492 S.W.2d 888; **Connor v. State,** supra; **Lienhart v. Burton,** 207 Ark. 536, 181 S.W.2d 468; **Connor v. Blackwood,** 176 Ark. 139, 2 S.W.2d 44; **Ferguson v. Hudson,** 143 Ark. 187, 220 S.W. 306. See also, **City of Ft. Smith v. Scruggs,** 70 Ark. 549, 69 S.W. 679, 58 L.R.A. 921, 91 A.S.R. 100.

We have held that a statute long in existence, under which many cases have been prosecuted and its validity inferentially sustained, should not be held invalid except for very cogent reasons and, then, only on the attack of one injuriously affected by it. **Swaim v. State,** 184 Ark. 1107, 44 S.W.2d 1098. Here we do not find cogent reasons to invalidate this act, which has existed for over 100 years, except for a reduction of the minimum punishment in 1955, and under which many prosecutions have been sustained. We further find that appellants have not been injuriously affected by its application.

We note that there are other jurisdictions which have rejected similar assaults on the constitutionality of such acts. See, e.g., **Everette v. State,** 465 S.W.2d 162 (Tex. Cr. App. 1971); **Pruett v. State,** 463 S.W.2d 191 (Tex. Cr. App. 1970); **State v. White,** 217 A.2d 212 (Me. 1966); **State v. Rhinehart,** 70 Wash. 2d 649, 424 P.2d 906 (1967); **People v. Hurd,** 5 Cal. App. 3d 865, 85 Cal. Rptr. 718 (1970); **People v. Roberts,** 256 Cal. App. 2d 488, 64 Cal. Rptr. 70 (1967); **People v. Ragsdale,** 177 Cal. App. 2d 676, 2 Cal. Rptr. 640 (1960); **People v. Massey,** 137 Cal. App. 2d 623, 290 P.2d 906 (1955); **Wash-**

ington v. Rodriguez, 82 N.M. 428, 483 P.2d 309 (Ct. App. 1971); **Jaquith v. Commonwealth,** 331 Mass. 439, 120 N.E. 2d 189 (1954).

We find no error in the trial court's sustaining the prosecuting attorney's objection and motion to strike testimony of the professed fiancee of Burkhead in response to the question "Have you ever known Tom Burkhead to have any tendencies toward being a homosexual?" We do not take this response to be a statement of the witness' opinion of either the physical or mental condition of Burkhead, as argued by appellants. The inquiry is more nearly equated with one as to this appellant's character. We have defined character to be "what a person is" and to include natural and acquired traits. **Biddle v. Riley,** 118 Ark. 206, 176 S.W. 134. Proof of character cannot be made except by showing general reputation and not by specific acts or conduct. In **Henson v. State,** 239 Ark. 727, 393 S.W.2d 856, the defendant presented the testimony of three young women, each saying that she had been alone with the defendant and he had never attempted to make any advance to her. The state rebutted this testimony by testimony of two other women that defendant had raped them. This court reversed the conviction, saying that none of the women should have been allowed to testify, because their testimony constituted an effort to show the character of the defendant by specific acts and was, therefore, erroneously admitted. We said that the evidence offered by the defendant was clearly inadmissible. The analogy is certainly sufficient to justify the exclusion of this testimony in the case before us.

In addition, however, we find authorities in other states have treated the particular question directly. In **Berger v. State,** 179 Md. 410, 20 A.2d 146 (1941), the refusal to permit the wife of a defendant charged with an unnatural and perverted attack on another woman to be asked if her husband had ever shown any sexual abnormalities was held proper. In **State v. Sinnott,**

24 N.J. 408, 132 A.2d 298 (1957), a sodomy case, the court refused to allow psychiatric testimony that the defendant did not have sexual deviate traits. Both courts held that such inquiries went to the character of the defendant, which could be proved only by general reputation of the accused and not by evidence of particular acts or conduct or testimony of intimates. Attempted showing of good character of one charged with taking indecent liberties with females under the age of 15, by showing a lack of previous incidents, was also held improper in **State v. Fairbanks,** 25 Wash. 2d 686, 171 P.2d 845 (1946). We find ample authority for the rejection of the testimony in the cases cited and find textual support in 22A C.J.S. 898, Criminal Law, § 691 (39).

Appellants also assert that reversible error was committed by the prosecuting attorney in cross-examining Carter, and that their motion for mistrial on that ground was erroneously denied. The questioned interrogatory was asked after Carter had declined to answer when asked if he was a homosexual unless the word be defined by the questioner. When this occurred the cross-examiner propounded and received a negative answer to the following question:

> . . . Is it not a fact, and I want to remind you that you are under oath now; is it not a fact that in another matter in this very court room, on that stand, that you testified under oath that you were, and are, a homosexual?

At the outset we do not agree with appellants that this form of question constitutes a stronger assertion of fact than it would had it begun with the words "Did you know that . . .?" We do not consider the question as worded to constitute an assertion of fact at all, particularly since the matter was not pursued when a negative answer was given. Neither do we agree that there is any assertion that Carter was involved in another prosecution. "[A]nother matter in this very court, on

that stand" could as easily be taken to refer to a civil case as to a criminal one, and if taken to be the latter, to the prosecution of someone other than Carter.

In the light of Carter's evasion of preceding questions, we find no error here. Carter was subject to the same latitude of cross-examiation as any other witness. But appellants contend that Carter could be impeached only under Ark. Stat. Ann. §§ 28-707 and 708 (Repl. 1962). Appellants misapprehend the proper application of these statutes. They are only a limit on the introduction of evidence to impeach or contradict the witness, but not upon his cross-examination. See **Wilson v. Thurston National Insurance Company,** 251 Ark. 929, 475 S.W.2d 881; **Bockman v. Rorex,** 212 Ark. 948, 208 S.W.2d 991. These statutes probably would have come into play had the state attempted to contradict the negative answer given by Carter. See **Holcomb v. State,** 218 Ark. 608, 238 S.W.2d 505; **Bockman v. Rorex,** supra.

Appellants argue that there was reversible error in that the trial judge, court reporter and counsel for both state and appellants went into the jury room for the purpose of answering an inquiry by jurors. We hasten to point out that this occurred before our decision in **Martin v. State,** 254 Ark. — (July 23, 1973), 497 S.W.2d 268. The record discloses an identical procedure here and in **Martin.** We hold that the error was not reversible on the authority of **Martin.** We trust that the caveat there is adequate to point up the hazards involved in such a procedure, and are confident that resort will not be had to it in the future.

Since appellants have failed to demonstrate that there was any reversible error, the judgment is affirmed.

LAW OR CHANCERY MANDATE

State of Arkansas
In the Supreme Court } SCT

Be It Remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court Room in the City of Little Rock, on the 1st day, being the first Monday of October, A.D. 1973, amongst others were the following proceedings, to-wit:

On the 13th day of November, A.D. 1973, a day of said term .....

Claude S. "Sandy" Carter, Jr., and Thomas C. Burkhead
Appellants
No. CR73-87s.
State of Arkansas
Appellee

Appeal from Miller Circuit Court, ... District

11-13-73 Petition for Rehearing denied.

FILED
MAR 11
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1211

Claude S. Carter, Jr. and
Thomas C. Burkhead ..... *Petitioners*

V.

State of Arkansas ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION

JIM GUY TUCKER
Attorney General
State of Arkansas

ALSTON JENNINGS, JR.
Assistant Attorney General
State of Arkansas
Justice Building
Little Rock, Arkansas 72201
Attorneys for Respondent

INDEX

PAGE

OPINION BELOW 1

JURISDICTION 1

QUESTIONS PRESENTED 2

STATEMENT 2

ARGUMENT:

I. Ark. Stat. Ann. §41-813 is not unconstitutionally vague 3

II. Petitioners constitutional rights to privacy were not violated 4

III. The sentence imposed was not excessive 5

CONCLUSION 7

CASES CITED

Conner v. State, 253 Ark. 854, 490 S.W.2d 114, appeal dismissed for want of a substantial federal question, 42 U.S. L. Week 3269 (U.S. November 5, 1973) (No. 72-1612) 4

Norton v. Macy, 417 F. 2d 1161 (D.C. Cir., 1969) 5

Smith v. State, 150 Ark. 265, 234 S.W. 32 4

Strum v. State, 168 Ark. 1012, 272 S.W. 359 4

STATUTES CITED

Ark. Stat. Ann. §41-813 3

Ark. Stat. Ann. §41-814 3

OTHER MATERIAL

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, COPYRIGHT 1966 3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973
No. 73-

Claude S. Carter, Jr. and
Thomas C. Burkhead ..... *Petitioners*

V.

State of Arkansas ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The Opinion of the Arkansas Supreme Court is reported at 255 Ark. 225, 500 S.W.2d 368 and is reproduced as an appendix to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether Ark. Stat. Ann. §41-813, for the violation of which Petitioners were convicted, is unconstitutionally vague.

2. Whether the arrest and conviction of Petitioners for sodomy violated their constitutional rights to privacy.

3. Whether the sentence imposed by the jury constituted "cruel and unusual punishment in violation of the Fourteenth Amendment."

STATEMENT OF THE CASE

Petitioners were arrested by two sheriff's deputies at 11:00 p.m. on the night of September 27, 1972 at a State camping ground or "rest area" adjacent to Interstate 30 in Miller County, Arkansas.

Petitioners were charged with a violation of Ark. Stat. Ann. §41-813 and were convicted on the evidence given by the two officers who testified that Carter and Burkhead had been observed in the act of fellatio. Petitioner Carter was 28 years old at the time of trial and Petitioner Burkhead was 51. The jury assessed punishment at eight (8) years imprisonment.

The questions raised in the Petition were considered by the Supreme Court of Arkansas which rejected Petitioner's arguments on their merits and affirmed both convictions and sentences on October 8, 1973.

ARGUMENT

I.

Ark. Stat. Ann. §41-813 is not unconstitutionally vague.

Ark. Stat. Ann. §41-813 reads as follows:

> "Every person convicted of sodomy, or buggery shall be imprisoned in the penitentiary for a period not less than one (1) nor more than twenty-one (21) years."

The commonly accepted meaning and usage of the word "sodomy" is reflected in *Webster's Third New International Dictionary*, copyright 1966, at page 2165:

> "Sodomy - the homosexual proclivities of the men of the city as narrated in Gen. 19: 1-11: carnal copulation with a member of the same sex or with an animal or unnatural carnal copulation with a member of the opposite sex; *specif.:* the penetration of the male organ into the mouth or anus of another - compare bestiality, buggery, cunnilingus, fellatio, homosexuality, pederasty."

The State submits that the statute in question is drafted in words of sufficient clarity to advise a person of average intelligence of the acts prohibited. Ark. Stat. Ann. §41-814 provides:

> "Proof of actual penetration into the body shall be sufficient to sustain an indictment for the crime against nature."

The Arkansas Supreme Court has consistently interpreted the statute to proscribe oral-genital contact

whether cunnilingus, *Smith v. State*, 150 Ark. 265, 234 S.W. 32, or fellatio, *Strum v. State*, 168 Ark. 1012, 272 S.W. 359; *Connor v. State*, 253 Ark. 854, 490 S.W.2d 114, appeal dismissed for want of a substantial federal question, 42 U.S.L. Week 3269 (U.S. November 5, 1973) (No. 72-1612).

It is hereby submitted that the statute in question is not unconstitutionally vague and that judicial interpretation of the statute has made it absolutely clear that fellatio is indeed proscribed. At any rate, no substantial federal question is raised.

II.

Petitioners constitutional rights to privacy were not violated.

Petitioners argue that the act for which they were arrested occurred in private and "hurt no one, with the possible exception of themselves." The facts of the case, as reviewed by the Arkansas Supreme Court, are otherwise. The Court noted that the public rest area in which the automobile was parked was well lighted, that use of a flashlight was unnecessary to observe the actions of the people within the automobile, that the area was crowded and other cars were parked nearby, and that the site was frequented by children. Further, the officers testified that visitors to the rest area had recently complained about homosexual advances and of the public performance of homosexual acts. The Court found "[N]o greater degree of privacy than that shown in *Connor* . . . " (supra).

Clearly the offense occurred in public. Whatever the boundaries of the constitutional right to privacy, this

Court has never suggested that they be expanded to protect the public performance of homosexual acts. The question of the State's interest in prohibiting homosexual activity between consenting adults *in private* is not brought before the Court by the present case.

Petitioners cite *Norton v. Macy*, 417 F. 2d 1161 (D.C. Cir. 1969) as dealing with "[S]imilar conduct in an automobile on a public street . . . " The *Norton* case involved the dismissal of a federal employee from his position as a budget analyst for NASA on the basis of an allegation by one Proctor that the appellant had made a homosexual advance (" . . . Proctor told police that appellant had felt his leg . . . ") in an automobile. The State would submit that the "conduct" in *Norton, supra*, was not "similar" to that of Petitioners, that the issues in *Norton* were entirely different from those involved in a criminal prosecution as in the instant case, and that *Norton* is not applicable to the case at bar.

In short, no substantial federal question has been raised.

III.

The sentence imposed was not excessive.

The eight (8) year sentence imposed by the jury was within the range set by the statute (one to twenty-one years) and considerably less than the maximum. As noted by the Arkansas Supreme Court: "It is within the province of the legislative branch to classify crimes and determine the punishment thereof."

The fact that the jury had a "broad latitude" in assessing punishment in no way indicates that their decision was "arbitrary."

Petitioners ask this Court to notice that: "The Arkansas State Penitentiary . . . is not just any penitentiary." It is suggested that the possibility of homosexual assault is greater in the Arkansas State Penitentiary than in the correctional institutions of other states (although it is conceded that "It is true that conditions have improved somewhat . . . ") and that imprisonment therein is cruel and unusual punishment in and of itself.

It is a well-known and most unfortunate fact that homosexual assaults occasionally occur in most penal institutions. The State would take issue with Petitioners' unsupported suggestion that the likelihood of such an attack is greater in the Arkansas Penitentiary system than elsewhere. At any rate, no federal question is raised by such an allegation, especially when unsupported by a factual basis.

CONCLUSION

On the basis of the foregoing, Respondent submits that the decision of the Arkansas Supreme Court does not conflict with any federal case or statute or with the United States Constitution. No federal question having been raised, no basis is presented for the granting of certiorari. It is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JIM GUY TUCKER
Attorney General

ALSTON JENNINGS, JR.
Assistant Attorney General
State of Arkansas
Justice Building
Little Rock, Arkansas 72201

Attorneys for Respondent